ATTORNEY FOR APPELLANT:

JOHN PINNOW
State Public Defenders Office
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROY G. LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A04-0512-CR-746
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Daniel C. Banina, Judge
Cause No. 52D01-0503-FA-35

September 20, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Roy C. Lewis (Lewis), appeals his conviction for Count I, criminal confinement, a Class B felony, I.C. § 35-42-3-3(a)(1); Count II, pointing a firearm, a Class D felony, I.C. § 35-47-4-3(b); Count III, domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3; Count IV, criminal recklessness, a Class D felony, I.C. § 35-42-2-2(b)(1)(2); and Count V, battery by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-1(a)(3).

We reverse and remand for a new trial.

ISSUES

Lewis raises four issues on appeal, only one of which we find dispositive and restate as follows: Whether Lewis knowingly and intelligently waived his Sixth Amendment right to counsel.

FACTS AND PROCEDURAL HISTORY

By February 2005, Lewis and Brenda White (White) had been living together for over ten years and, at that time, resided at West Egypt Hill Drive in Miami County. On February 24, 2005, White left her place of employment at approximately 10.30 p.m. After picking up her children at her father's residence, she drove home. When she arrived home, all the lights were off, and on entering the residence, White turned on the kitchen and dining room lights. She went into the living room and switched on a small lamp. Lewis, lying on the couch, picked up the lamp and threw it across the room, telling White that she was waking everyone up. Lewis walked out of the room, and after turning on an overhead light, White started to pick up items before going to bed.

Returning to the living room, Lewis struck White in the face, causing her pain. Next, Lewis hit White on the side of her face, knocking her onto the couch. Lewis then picked up a shotgun that was lying on the couch, jammed the barrel into White's forehead and told her that he would shoot her if she said one more word or opened her mouth. White sat on the couch in fear. After approximately ten minutes, Lewis removed the shotgun from White's forehead and left the room. White got up from the couch and walked into the dining room. As she talked about cleaning up the trash, Lewis became angry again and struck her in her mouth, causing White to bleed. Lewis then hit her in her throat, knocking her onto the bathroom floor and preventing her from speaking.

While White was lying on the bathroom floor, Lewis retrieved a hatchet from near the wood burning stove and returned to the bathroom. Standing over White, Lewis acted as if he was going to swing the hatchet at her. However, when he swung the hatchet, Lewis broke the bathroom light switch. Lewis tried to help White get off the floor, but White refused his help. She eventually got up and went to the kitchen where she tried to calm down. After Lewis asked White why she "made him do things like that," he walked into the living room. (Transcript p. 163). Later, White went into the bedroom and laid on the bed. Lewis entered the bedroom and unloaded the shotgun he had held against White's head.

The State filed an Information charging Lewis with Count I, criminal confinement, a Class B felony, I.C. § 35-42-3-3(a)(1); Count II, pointing a firearm, a Class D felony, I.C. § 35-47-4-3(b); Count III, domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3; Count IV, criminal recklessness, a Class D felony, I.C. § 35-42-2-2(b)(1)(2); and

Count V, battery by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-1(a)(3). On August 25, 2005, Lewis filed his "Motion to go Pro Se" (Appellant's App. p. 96). On August 28, 2005, after a hearing, the trial court appointed a public defender to assist Lewis in presenting his defense.

On October 26 and 27, 2005, a jury trial was held. At the close of the evidence, the jury returned guilty verdicts on Counts I through IV, and pronounced Lewis not guilty of Count V. On November 21, 2005, the trial court held a sentencing hearing and sentenced Lewis to twenty years on Count I, with two years suspended to probation, three years on Count II, one year on Count III, and three years on Count IV, with all sentences to run concurrently.

Lewis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Lewis contends that he did not knowingly and intelligently waive his right to counsel. Specifically, Lewis argues that the trial court failed to warn him of the dangers and disadvantages of proceeding *pro se* and to adequately inquire as to his motive for insisting on waiving his Sixth Amendment right.

The Sixth Amendment to the United State Constitution guarantees a criminal defendant the right to counsel. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Because the "average defendant does not have the professional legal skills to protect

himself" at trial, a defendant's choice to appear without professional counsel must be made intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 462-63, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). However, before a defendant waives his right to counsel and proceeds *pro se*, the trial court must determine the defendant's waiver of counsel is knowing, voluntary, and intelligent. *Jones*, 783 N.E.2d at 1138. This determination must be made with the awareness that the law indulges every reasonable presumption against a waiver of this fundamental right. *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001). Whether a defendant's waiver is knowing, intelligent, and voluntary depends on the particular facts and circumstances of the case. *Jones*, 783 N.E.2d at 1138.

While we have previously suggested guidelines a trial court may follow when advising a defendant regarding self-representation, the Indiana supreme court recently reiterated its rejection of a rigid test in this respect when it stated, "there are no prescribed talking points a court is required to include in its advisement to the defendant; it need only come to a considered determination that the defendant is making a voluntary, knowing, and intelligent waiver." *Poynter*, 749 N.E.2d at 1126; *Dowell v. State*, 557 N.E.2d 1063, 1066-67 (Ind. Ct. App. 1990), *trans. denied*, *cert. denied*. Therefore, we only require that the advisement to a defendant seeking self-representation be such that he is made "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Ellerman v. State*, 786 N.E.2d 788, 793 (Ind. Ct. App. 2003). Additionally, the trial court should not grant a request for self-representation unless it is satisfied that the

defendant has the mental capacity to understand the proceedings. *Id*. We review *de novo* a trial court's determination that the defendant validly waived his right to counsel. *Id*.

However, the record in the case before us clearly shows that Lewis did not strictly proceed *pro se*. Rather, the trial court insisted Lewis accept the assistance of stand-by counsel. In our recent decision of *Henson v. State*, 798 N.E.2d 540 (Ind. Ct. App. 2003), *trans. denied*, we analyzed the situation where a *pro se* defendant is aided by stand-by counsel. Analogizing *Henson* to a defendant claiming a violation of his Sixth Amendment right to effective assistance of counsel after conducting his defense *pro se* aided by appointed counsel, we stated that "the right to knowingly and intelligently waive counsel and the right to effective assistance from counsel are, metaphorically speaking, two sides of the same Sixth Amendment coin." *Id*. at 546. Essentially, we focused on whether the totality of the hybrid assistance between the *pro se* defendant and stand-by counsel was more akin to a defendant proceeding *pro se* or to a defense controlled by counsel. *Id*. Applying this standard to the *Henson* facts, we determined that Henson's hybrid representation was more like a proceeding *pro se*, and therefore, we held that the trial court was required to ensure Henson's waiver of counsel was knowing and voluntary. *Id*.

Likewise, here, our review of the record leads us to believe Lewis' hybrid representation more closely resembled a *pro se* proceeding. After the trial court accepted Lewis' request to proceed *pro se*, Lewis filed and argued several motions with regard to discovery, depositions, and purported missing evidence. At trial, Lewis conducted *voir dire*, albeit briefly, presented an opening statement, cross-examined the State's witnesses,

and presented his own witnesses. He concluded the evidence with his closing argument. Accordingly, because Lewis effectively proceeded *pro se* with minimal help from stand-by counsel, we need to review *de novo* the trial court's decision that Lewis' waiver of counsel was knowing and voluntary. *Id.*

The factors we may consider when reviewing the trial court's decision include: 1) the court's inquiry into the defendant's decision; 2) other evidence establishing whether the defendant understood the dangers and pitfalls of self-representation; 3) the defendant's background and experience; and 4) the context in which the defendant proceeded *pro se*. *Poynter*, 749 N.E.2d at 1127-28. The record reflects that the trial court's inquiry into Lewis' request to proceed *pro se* was limited, in pertinent part, to the following exchange:

> [TRIAL COURT]: It would probably do the record well if I were to summarize some of the prior activity in this case. The [trial court] had previously appointed [p]ublic [d]efender [], to represent [Lewis] and then at some point in time . . . there was [private counsel who] filed an appearance on behalf of [Lewis] and the [p]ublic [d]efender withdrew. We were set for a jury trial to begin August 24th . . . last week. [Private counsel] filed a continuance and then withdrew. Then I have a bunch of filings made by [Lewis] which we need to address today. [Lewis], I have a Motion for Prosecutory Misconduct and a Motion for Bond Reduction. I have a Motion to go Pro Se and I have a Motion for Chronological Case Summary. . . .
>
> * * *
>
> [TRIAL COURT]: I think the most important thing at this point to look into is your Motion to go Pro Se. You've indicated that you wish to represent yourself at trial is that correct?
>
> [LEWIS]: Yes sir, that is correct.

[TRIAL COURT]: Okay. I'm a little concerned about your ability to represent yourself at trial. If I were to allow you to represent yourself I would be having to hold you accountable to the same standard of practice . . . and the same procedures as if you were a practicing attorney. Do you understand that?

[LEWIS]: Yes sir.

[TRIAL COURT]: How far did you get in school?

[LEWIS]: Tenth grade.

* * *

[TRIAL COURT]: Well, I can tell from the many writings you sent to the [trial court] that your literary skills or writing skills are lacking.

[LEWIS]: Yes, very much so.

[TRIAL COURT]: I really question you going *pro se*. I would much rather recommend that you, that I re-appoint the [p]ublic [d]efender to represent you. At least to assist you.

[LEWIS]: Assist me would be fine yeah.

[TRIAL COURT]: Okay. Like for example, you filed these motions and you filed a certificate of service with the motions which, says you filed three copies of the motion to the Clerk. That's not, that's not what certificate of service is. You're supposed to file a copy with each of the parties, not just file it with the Clerk. You're supposed to send a copy to …

* * *

[TRIAL COURT]: That's why you need an attorney. You're facing some very serious charges here, you've been in jail for a long time already . . .

[LEWIS]: Okay.

[TRIAL COURT]: And we need to get this case to a conclusion.

[LEWIS]: Yes we do.

(Tr. pp. 3-5).

Furthermore, during his *voir dire*, Lewis made the following brief statement to the prospective jurors:

> I just want to explain why I'm representin' myself because the attorney's I had wouldn't, or didn't want to get the evidence I thought I need to present my case. … All I ask is … I am guilty of a couple of these crimes but there's four or five there I'm not guilty of. … and I guess I would like for you to … do your best in your judgment.

(Tr. p. 111).

After reviewing the almost non-existent inquiry conducted by the trial court into Lewis' requested waiver of counsel, we cannot say that his decision to proceed *pro se* was made voluntarily, knowingly, and intelligently. *See Henson*, 798 N.E.2d at 546. Not only did the trial court fail to raise Lewis' awareness regarding the dangers and pitfalls of proceeding *pro se* even in a minimal way, but absolutely no explanation was demanded prior to trial as to Lewis' reason to represent himself. Even though the record reflects that Lewis had prior involvements with the criminal judicial system, there is no evidence to suggest that he independently understood the danger of self-representation. To the contrary, Lewis' statement to prospective jurors during *voir dire* clearly indicates that he did not appreciate the pitfalls of being one's own advocate. Mindful that the law indulges every reasonable presumption against a waiver of the right to counsel, we conclude that Lewis did not make this choice with his eyes open. *See Ellerman*, 786 N.E.2d at 793. Therefore, we reverse Lewis' conviction and remand for a new trial.

CONCLUSION

Based on the foregoing, we conclude that Lewis did not knowingly and intelligently waive his Sixth Amendment right to counsel.

Reversed and remanded for a new trial.

BAILEY, J., and MAY, J., concur.